BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY L. PHILLIPS Claimant VS. **MANN STEEL CONTRACTORS** Respondent AND **COMMERCIAL UNION INSURANCE COMPANY** Insurance Carrier	)	Docket No. 148,036

ORDER

ON the 8th day of March, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Alvin E. Witwer, dated February 8, 1994, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and insurance carrier appeared by their attorney, Kip Kubin of Overland Park, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

ISSUES

Administrative Law Judge Alvin E. Witwer in his Award dated February 8, 1994, denied claimant workers compensation benefits finding the parties not subject to the provisions of the Kansas Workers Compensation Act.

Accordingly, the threshold issue here is whether the parties are subject to the provisions of the Kansas Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The basic facts of the instant case are not in dispute in that the claimant is a resident of Missouri; was injured in Missouri; and respondent's principal place of employment is in Missouri. If the Kansas Workers Compensation Act is to apply to claimant's injuries, the contract of employment has to have been made in the State of Kansas. See K.S.A. 44-506.

In March of 1990, the claimant, an union iron worker, worked for the respondent, Mann Steel Contractors, in St. Joseph, Missouri. He worked with his father and Rex Brunner, the husband of the owner of Mann Steel Contractors, who actively supervised the steel work on each project. Claimant had previously worked for the respondent on three different occasions in 1989. At the end of the three days of work in March of 1990, the claimant was given what is characterized as a layoff check and was told by Mr. Brunner that a job in Braymer, Missouri would be starting in the near future.

In order to find work as an iron worker, the claimant went out on his own and also worked out of the union hall in Kansas City, Missouri. It is accepted practice in the trade that after an iron worker receives a layoff check from an employer he is free to go to work for any other contractor and the previous employer has absolutely no obligation to recall or rehire the iron worker. The claimant testified that between March of 1990 and when he returned to work for the respondent on April 18, 1990, he drew unemployment benefits. However, if another contractor would have offered him a job during this period of time he would have accepted the job and would have gone to work for another contractor.

The Administrative Law Judge found that when the claimant returned to work for the respondent on April 18, 1990, he was recalled from a layoff status and this did not constitute a new employment contract. The Appeals Board, after reviewing the uncontradicted testimony of both the claimant and his father, John Phillips, disagree. An employee is in a layoff status with an employer when he is temporarily dismissed because business activity is suspended. Usually during a layoff an employee is still

considered to be employed by the employer. However, inherent in the term layoff is the employee's entitlement to recall. See CBS Inc. v International Photographers, 603 F.2d 1061, 1063 (2d Cir. 1979). The evidence herein establishes that neither the claimant nor the respondent had any obligation to each other after the job was completed in St. Joseph, Missouri in March of 1990. Claimant could have gone to work for another contractor and the respondent could have found another iron worker to work in April of 1990 instead of the claimant. The claimant clearly did not have recall rights to employment with the respondent. Accordingly, the Appeals Board finds and concludes that the claimant's return to employment of the respondent on April 18, 1990, was not a recall from layoff but was a new employment contract.

Having found that claimant's return to work for the respondent constituted a new employment contract, the next question to be answered is whether the contract was made in Kansas. K.S.A 44-506. The claimant's father, John Phillips, was contacted by Rex Brunner, supervisor for the respondent, on April 17, 1990, requesting that both Mr. Phillips and the claimant start to work for the respondent the next morning in Braymer, Missouri. Mr. Phillips told Mr. Brunner that he would go to work. Mr. Brunner then requested Mr. Phillips to contact the claimant to determine whether or not the claimant would also be interested in starting to work for the respondent. Mr. Phillips contacted the claimant by telephone in Wathena, Kansas where the claimant was visiting his sister. Mr. Phillips notified the claimant that Mr. Brunner had requested him to get in contact with the claimant and ask him if he was interested in starting to work the next day for the respondent. Claimant replied in the affirmative and both the claimant and his father reported to work the next day, April 18, 1990, in Braymer, Missouri.

In order for a new contract of employment to have been made during the telephone conversation between the claimant's father, Mr. Phillips, and the claimant on the evening of April 17, 1990, Mr. Phillips would have to have been acting as an agent of the respondent. The Administrative Law Judge found that the claimant's father was an agent of the respondent and the Appeals Board agrees with this finding.

The claimant presented uncontradicted evidence through his testimony and the testimony of his father, Mr. Phillips, that the respondent through Rex Brunner, requested Mr. Phillips to call his son, the claimant, and see if he would start to work in Braymer, Missouri at 8:00 a.m. the next morning. On occasions in the past, Mr. Brunner had asked Mr. Phillips to contact iron workers requesting them to go to work for the respondent. Since the claimant agreed to start work for the respondent, Mr. Phillips did not notify Mr. Brunner of the claimant's affirmative response. However, if the claimant would have said that he was not interested in working for the respondent than Mr. Phillips would have notified Mr. Brunner. Mr. Brunner would then have had Mr. Phillips contact someone else to work. Both the claimant and his father testified that Mr. Brunner knew that the claimant had accepted the respondent's offer of employment prior to the claimant arriving at the job site in Missouri the following day. Mr. Brunner knew from previous experience that if the claimant had not accepted the job offer, Mr. Phillips would have contacted him prior to the next day. The Appeals Board concludes that an implied agency existed between the respondent and Mr. Phillips. The foregoing statements and the conduct of both the respondent and Mr. Phillips established that the respondent intended to clothe Mr. Phillips with such an appearance of authority that when he called the claimant and asked him if he wanted to go to work for the respondent that the claimant knew that his father was authorized to make such an offer. Claimant further knew that if he accepted the offer that

he had a new employment contract with respondent. See Professional Lens Plan, Inc. v. Polaris Leasing Corp., 238 Kansas. 384, 390-391, 710 P.2d 1297 (1985).

In the present case, the last question to be answered concerning the application of the Kansas Workers Compensation Act to the parties is whether the new contract of employment was made in Kansas. The Kansas Supreme Court has held that an offer of employment during a telephone conversation by an agent of an employer which is immediately accepted by the injured employee is the last act necessary for the formation of the contract. The contract of employment is made where the acceptor speaks his or her acceptance. Pearson v. Electric Service Co., 166 Kan. 300, 201 P.2d 643 (1949); Hartigan v. Babcock and Wilcox Co., 191 Kan. 331, 380 P.2d 383 (1963); Morrison v. Hurst Drilling Co., 212 Kan. 706, 512 P.2d 438 (1973).

The evidence has established in this case that the claimant accepted the respondent's offer of employment during the telephone conversation with his father, an agent of the respondent, while he was visiting his sister in Wathena, Kansas. Therefore, the contract of employment was made in the state of Kansas. K.S.A 44-506. It is the finding and the conclusion of the Appeals Board that the Kansas Workers Compensation Act applies to the parties herein and to the injury sustained to the claimant while employed by the respondent on April 24, 1990.

Since Kansas has jurisdiction over this claimant, the following issues remain for the decision of the Appeals Board:

(1) What is the nature and extent of claimant's disability.
(2) Whether claimant is entitled to future medical treatment.
(3) Whether claimant is entitled to unauthorized medical.
(4) Whether claimant is entitled to payment of unpaid medical expenses from Med Clinic of St. Joseph, Inc. in the amount of $354.00 and St. Luke Hospital in the approximate amount of $500.00.
(5) Whether the claimant is entitled to additional temporary total compensation disability benefits from April 24, 1990 through March 31, 1991 less any amounts previously paid.
(6) Whether claimant is entitled to vocational rehabilitation benefits.

With respect to the issue of nature and extent of claimant's disability, the Administrative Law Judge found that if the claimant was governed by the Kansas act, the claimant, on April 24, 1990, while employed by the respondent suffered a work related accidental injury that resulted in a sixty percent (60%) permanent partial general work disability. The parties to this appeal did not argue the appropriateness of this finding. The Appeals Board has reviewed the uncontradicted evidence presented by the claimant regarding work disability and concludes that it supports the sixty percent (60%) finding of the Administrative Law Judge. Therefore, the Appeals Board incorporates and adopts herein this finding of the Administrative Law Judge as if specifically set forth in this order.

As to the question of future medical, the claimant established through his testimony that he had continuing symptoms in his back with tingling sensation radiating down his left leg. Dr. Prostic evaluated the claimant at the request of his attorney and found that the claimant had consistent discomfort in his left lower back with paresthesia radiating down his left leg. Claimant also injured his right knee during the April 24, 1990 accident which

continues to cause him discomfort. Based on this uncontradicted evidence, the Appeals Board finds that the claimant is entitled to future medical upon proper application before the Director of Workers Compensation.

In reference to unauthorized medical, the Appeals Board finds that the claimant is entitled to the $350 statutory maximum allowance upon proper presentation of such expense to the respondent.

The claimant made a request for payment of reasonable and necessary medical expenses in the amount of $354.00 incurred at Med Clinic of St. Joseph, Inc. and St. Luke Hospital in the approximate amount of $500.00. Since this claim is found to be compensable, the Appeals Board further finds that the respondent should pay all reasonable and necessary medical expenses for the treatment of claimant's work related injury upon proper presentation of such expenses.

On the date of the regular hearing, March 26, 1993, the claimant was unemployed and was attending Missouri Western University on a full time basis in a program provided by the Missouri Department of Vocational Rehabilitation. Future vocational Rehabilitation benefits pursuant to the Kansas Workers Compensation Act will only be provided upon application to the Director of Workers Compensation with appropriate consideration given to the rehabilitation benefits provided by the State of Missouri.

According to the Administrative Law Judge's Award, the parties stipulated that the claimant receive 45 weeks of temporary total disability compensation benefits at a weekly rate of $271.00 for a total sum of $12,195.00. Claimant claims additional temporary total weekly benefits. The administrative law judge found the claimant's average weekly wage to be $694.73 by calculating the straight time hourly rate of $15.41 per hour times the 40 hour work week for a total of $616.40. He then added $80.33 found to be the cost of the fringe benefits for an average weekly wage of $694.73. However, as one can ascertain, a mistake was made in addition and the correct average wage of $696.73 is herein adopted by the Appeals Board for calculation of benefits in this matter. The maximum weekly compensation rate effective on the date of the claimant's accident, April 25, 1990 was $271.00. Therefore, the claimant was paid at the correct compensation rate and the record does not contain proof that the claimant was entitled to more than the 45 weeks of temporary total disability payments paid by the respondent. The Appeals Board denies the claimant's claim for additional temporary total disability benefits for lack of proof.

AWARD

WHEREFORE, is the finding, decision and order of the Appeals Board that the Award of the administrative law judge, Alvin E. Witwer dated February 8, 1994, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jerry L. Phillips, and against the respondent, Mann Steel Contractors, and its insurance carrier, Commercial Union Insurance Company, for an accidental injury sustained on April 24, 1990, and based upon an average weekly wage of $696.73.

Claimant is entitled to 45 weeks of temporary total disability at the rate of $271.00 per week or $12,195.00 followed by the payment of $271.00 per week for 323 weeks and one final payment in the amount of $272.00 or $87,805.00 for a sixty percent (60%) permanent partial general work disability, making a total award of $100,000.00.

As of August 5, 1994, there is due and owing the claimant 45 weeks of temporary total disability compensation at $271.00 per week in the sum of $12,195.00 plus 178.43 weeks of permanent partial disability compensation at $271.00 per week in the sum of $48,354.53 for a total due and owing of $60,549.53 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining the balance in the amount of $39,450.47 shall be paid at $271.00 per week until fully paid or until further order of the Director of the Kansas Workers Compensation.

Future medical payment benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant is entitled to unauthorized medical up to the statutory maximum amount of $350.00 upon proper presentation of expenses.

Respondent is ordered to pay all reasonable and necessary medical expenses upon proper presentation of expenses.

Future vocational rehabilitation benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to provisions of K.S.A. 44-536.

The fees necessary to defray expenses of the administration of the workers compensation act are hereby assessed against the respondent to be paid direct as follows:

Hostetler & Associates, Inc. $764.80

IT IS SO ORDERED.

Dated this ____ day of August, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc:
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Alvin E. Witwer, Administrative Law Judge
George Gomez, Director